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7 CENTRAL GARDEN & PET COMPANY,
8 Plaintiff,
9 v.
10 CARLSON MORGAN, LLC,
11 Defendant.

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13 Case No. 15-cv-00609-JSW (KAW)

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28 **REPORT AND RECOMMENDATION
GRANTING PLAINTIFF'S MOTION
FOR DEFAULT JUDGMENT AGAINST
DEFENDANT CARLSON MORGAN,
LLC**

Plaintiff Central Garden & Pet Company ("Central") moves for default judgment against Defendant Carlson Morgan, LLC, on its trademark infringement claim. (Dkt. No. 16.) Plaintiff's motion follows an entry of default by the clerk on April 9, 2015. (Dkt. No. 11.) Under Federal Rule of Civil Procedure 12(a)(1), Defendant was required to file a pleading or other response within twenty one days of service, no later than June 11, 2015. Defendant has not appeared in this action, nor did it respond to Plaintiff's complaint or motion for default judgment.

This matter was referred to the undersigned for report and recommendation. On July 2, 2015, the Court held a hearing on Plaintiff's motion for default judgment, at which Defendant did not appear.

After a review of Plaintiff's pleadings and moving papers, and for the reasons set forth below, the Court recommends that Plaintiff's motion for default judgment be GRANTED.

I. BACKGROUND AND PROCEDURAL HISTORY

Defendant Carlson Morgan, LLC is a California limited liability company with its principal place of business in Modesto, California. (Compl. ¶ 4.; Dkt. No. 1.) Defendant is in the business of producing and distributing dog treats throughout California. (*Id.*)

1 Plaintiff, a Delaware corporation with its principal place of business in Walnut Creek,
2 California, is in the business of producing and distributing pet food throughout the United States.
3 (*Id.* at ¶ 3.) One of Plaintiff's pet food brands is SIMPLY NATURAL, which it uses in
4 connection with premium grain-free dog food. (Compl. ¶ 5.) SIMPLY NATURAL dog food is
5 distributed in four to twenty six pound bags in pet, mass merchandise, and grocery stores. (*Id.*)

6 Plaintiff's complaint alleges that it is the owner of United States Trademark Registration
7 No. 2,604,270 for SIMPLY NATURAL for pet food in Class 31. (Compl. ¶ 6.) Plaintiff alleges
8 that this registration is contestable pursuant to 15 U.S.C. § 1065. (*Id.*) Plaintiff further alleges
9 that it has used the SIMPLY NATURAL trademark since 2000, and that it has become a strong
10 and well-known trademark for premium grain-free dog food. (*Id.*) The complaint also alleges that
11 Plaintiff owns United States Trademark Registration No. 4,645,622 for SIMPLY NATURAL and
12 design. (*Id.*)

13 Defendant sells a variety of dog and cat treats, which it markets as premium, grain-free,
14 and "natural and healthy" protein treats made from "the best ingredients available." (Compl. ¶ 8.)
15 Defendant uses the trademark SIMPLY NATURAL and R SIMPLY NATURAL on various
16 flavors of dog treats, including beef, duck, lamb, rabbit, tuna jerky, chicken jerky, and liver and
17 bacon. (*Id.*) Defendant sells these treats in bags ranging from three ounces to twenty four ounces.
18 (*Id.*)

19 Defendant filed an intent-to-use trademark application for SIMPLY NATURAL for dog
20 treats, but was refused registration under Lanham Act § 2(d) because the trademark was
21 confusingly similar to Plaintiff's registered trademark for SIMPLY NATURAL. (Compl. § 9.)
22 Plaintiff alleges that Defendant embarked on a scheme to appropriate the goodwill of Plaintiff's
23 trademark when it added the letter "R" to its proposed trademark for certain packages of its dog
24 treats and on its website, in an attempt to distinguish its mark from Plaintiff's trademark. (*Id.*)
25 Plaintiff alleges that Defendant has an extensive web presence, and that it uses its website
26 www.cmdogtreats.com, as well as online retailers such as amazon.com and entirelypets.com, to
27 market and sell its SIMPLY NATURAL dog treats throughout California and elsewhere. (See
28 Compl. at ¶ 11.) Plaintiff claims that after it learned of Defendant's application to register its

1 trademark, it contacted Defendant and requested that it not use the SIMPLY NATURAL
2 trademark. (Compl. ¶ 12.) Defendant did not respond to Plaintiff's request. (*Id.*)

3 On February 7, 2015, Plaintiff filed the instant suit alleging federal trademark
4 infringement. (Dkt. No. 1.) Specifically, Plaintiff alleges that Defendant is infringing on its
5 federally registered trademark for SIMPLY NATURAL for premium grain-free dog treats, as well
6 as on its unregistered trademark for SIMPLY NATURAL for pet food. (Compl. ¶¶ 16, 20.)
7 Service was made on Defendant's owner at Defendant's corporate offices in Modesto, California.
8 (Dkt. No. 10.)

9 On April 9, 2015, Plaintiff filed a request for entry of default against Defendant. (Dkt. No.
10.) The Clerk entered default against Defendant on the same day. (Dkt. No. 11.) On May 21,
11 2015, Plaintiff filed a motion for default judgment, seeking judgment on its federal trademark
12 infringement claim, an injunction against further acts of infringement, and its attorneys' fees and
13 costs.¹ (Dkt. No. 16.) The matter was referred to the undersigned on May 22, 2015 for report and
14 recommendation. (Dkt. No. 17.)

15 On July 2, 2015, the Court held a hearing, at which Defendant did not appear.

16 II. DISCUSSION

17 A. Legal Standard

18 Federal Rule of Civil Procedure 55(b)(2) permits a court to enter a final judgment in a case
19 following a defendant's default. *Shanghai Automation Instrument Co. v. Kuei*, 194 F. Supp. 2d
20 995, 999 (N.D. Cal. 2001). Whether to enter a judgment lies within the court's discretion. *Id.*
21 (citing *Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986)).

22 Before assessing the merits of a default judgment, a court must confirm that it has subject
23 matter jurisdiction over the case and personal jurisdiction over the parties, as well as ensure the
24 adequacy of service on the defendant. See *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). If the
25 court finds these elements satisfied, it turns to the following factors ("the Eitel factors") to

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¹ Plaintiff asserts that if such judgment is entered, it would voluntarily dismiss the remaining two
28 claims for federal infringement of an unregistered trademark pursuant to 15 U.S.C. § 1125, and
restitution based on unjust enrichment. (Pl.'s Mot. at 2.)

1 determine whether it should grant a default judgment:

2 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's
3 substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at
4 stake in the action[,] (5) the possibility of a dispute concerning material facts[,] (6)
5 whether the default was due to excusable neglect, and (7) the strong policy
underlying the Federal Rules of Civil Procedure favoring decision on the merits.

6 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986) (citation omitted). In this analysis, "the
7 well-pleaded allegations of the complaint relating to a defendant's liability are taken as true."
8 *Pepsico, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1175 (C.D. Cal. 2002) (citing *Televideo*
9 *Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987)). Nevertheless, default does not
10 compensate for essential facts not within the pleadings and those legally insufficient to prove a
11 claim. *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992).

12 **B. Subject Matter Jurisdiction and Personal Jurisdiction**

13 This Court has subject matter jurisdiction over this matter because Plaintiff raises claims
14 under federal law, specifically trademark infringement under the Lanham Act, 15 U.S.C. § 1114.
15 29 U.S.C. §§ 1331, 1338.

16 Venue is proper in the Northern District of California under 28 U.S.C. § 1391, as Plaintiff
17 is a corporation with its principal place of business in Walnut Creek, California, which is located
18 within the Northern District, and Plaintiff has suffered injury and harm here due to Defendant's
19 conduct. (Compl. ¶ 3.)

20 Plaintiff served Defendant with a copy of the summons and complaint in compliance with
21 federal law. (Dkt. No. 10.) The Court, therefore, has personal jurisdiction over the parties. *See*
22 Fed. R. Civ. P. 4(h).

23 **C. Analysis of the *Eitel* factors**

24 Since the Court has jurisdiction in this matter, this Court must turn to the *Eitel* factors to
25 determine whether the entering of a default judgment is appropriate.

26 1. Prejudice Against Plaintiff

27 Plaintiff will suffer prejudice if the court does not enter a default judgment against
28 Defendant, because Plaintiff would have no means to protect its trademark and collect the

1 reasonable costs that Defendant owes. *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177. Plaintiff would,
2 therefore, be gravely prejudiced if the Court did not enter default judgment.

3 2. Merits of Plaintiff's Claim and Sufficiency of the Complaint

4 After entry of default, "well-pled allegations in the complaint regarding liability are
5 deemed true." *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002). The Court will,
6 therefore, consider the merits of Plaintiff's claims and the sufficiency of its pleadings together.

7 Plaintiff alleges that Defendant committed trademark infringement under 15 U.S.C. §
8 1114. (Compl. ¶¶ 15-17.) To prove trademark infringement, Plaintiff must show (1) that its
9 marks are valid and protectable trademarks; (2) that plaintiff owns the trademark; (3) that plaintiff
10 used its marks in interstate commerce; (4) that defendant used in commerce a reproduction or copy
11 of a registered trademark in connection with the advertising or sale of goods or services; and (5)
12 that such use is likely to cause confusion, mistake, or deceive consumers.

13 First, Plaintiff has alleged that its SIMPLY NATURAL mark for premium grain-free dog
14 food is a valid and protectable trademark that was registered with the United States Patent and
15 Trademark Office. Second, Plaintiff has alleged that it owns the trademark. Third, the complaint
16 alleges that Plaintiff has used its mark in interstate commerce. Specifically, that Plaintiff has used
17 its SIMPLY NATURAL trademark in connection with the sale of dog food, nationwide, since
18 2000. Fourth, Plaintiff alleged that Defendant has used its SIMPLY NATURAL and R SIMPLY
19 NATURAL marks in connection with the sale, offering for sale, distribution, and advertising of
20 Defendant's dog treat products. Finally, Plaintiff has alleged that Defendant's use of Plaintiff's
21 mark is likely to cause confusion by causing consumers to believe that Plaintiff is affiliated or
22 endorses Defendant's business. Thus, Plaintiff has adequately pleaded a claim for trademark
23 infringement.

24 3. The Amount of Money at Stake

25 The fourth *Etel* factor focuses on the amount at issue in the action, as courts should be
26 hesitant to enter default judgments in matters involving large sums of money. "When the money
27 at stake in the litigation is substantial or unreasonable, default judgment is discouraged." *Bd. of*
28 *Trs. v. Core Concrete Const., Inc.*, No. C 11-2532 LB, 2012 WL 380304, at *4 (N.D. Cal. Jan. 17,

1 2012) (citing *Etel*, 782 F.2d at 1472). However, when “the sum of money at stake is tailored to
2 the specific misconduct of the defendant, default judgment may be appropriate.” *Id.* (citations
3 omitted). Here, the amount of money at stake is reasonable as discussed further below. Therefore,
4 the fourth *Etel* factor weights in favor of granting default judgment.

5 4. Likelihood of Dispute Concerning Material Facts

6 With respect to the fifth factor, Defendant has not participated in this action and has not
7 made any attempt to contest any of Plaintiff’s material facts or legal assertions, or moved to set
8 aside the entry of default despite being served with all papers. Even if the material facts were
9 found to be untrue, the effect of a permanent injunction on any non-use of Plaintiff’s mark would
10 be negligible, because there would be no conduct to be enjoined, and Defendant could move to set
11 aside the default judgment awarding attorneys’ fees and reasonable costs.

12 5. Whether Default was a Result of Excusable Neglect

13 Plaintiff properly served Defendant with the Summons and Complaint. Defendant made
14 no appearance in this matter and has not responded to Plaintiff’s motion. Consequently, there is
15 nothing suggesting that Defendant’s failure to appear and litigate this matter is based on excusable
16 neglect. *Shanghai*, 194 F. Supp. 2d at 1005.

17 6. Federal Rules Preference for a Decision on the Merits

18 After an examination of these facts in the aggregate, this Court finds that the *Etel* factors
19 favor entry of default judgment despite the Federal Rules of Civil Procedure’s preference for a
20 decision on the merits. This Court, therefore, RECOMMENDS an entry of a default judgment.

21 **III. DAMAGES & INJUNCTIVE RELIEF**

22 After entry of default, well-pleaded factual allegations in the complaint are taken as true,
23 except as to the amount of damages. *Fair Hous. of Marin*, 285 F.3d at 906. To recover damages
24 after securing a default judgment, a plaintiff must prove the relief it seeks through testimony or
25 written affidavit. *Bd. of Trs. of the Boilermaker Vacation Trust v. Skelly, Inc.*, 389 F. Supp. 2d
26 1222, 1226 (N.D. Cal. 2005); *see Pepsico, Inc.*, 238 F. Supp. 2d at 1175 (citing *Televideo Sys.*,
27 *Inc.*, 826 F.2d at 917-18).

28 In its complaint and in its motion for default judgment, Plaintiff seeks a permanent

1 injunction forbidding Defendant from using Plaintiff's mark, as well as attorneys' fees and costs.

2 Plaintiff alleges that Defendant's actions constituted willful, deliberate, and intentional
3 infringement of Plaintiff's federally registered trademark in violation of sections 15 U.S.C. §§
4 1114 and 1125(a) of the Lanham Act. (Pl.'s Mot. at 6; Compl. ¶ 13.) An allegation of willful
5 trademark infringement is deemed true on default. *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528
6 F.3d 696, 702 (9th Cir. 2008). Furthermore, “[w]illfulness can be established by evidence of
7 knowing conduct or by evidence that the defendant acted with an aura of indifference to plaintiff's
8 rights” *Philip Morris USA Inc. v. Liu*, 489 F. Supp. 2d 1119, 1123 (C.D. Cal. 2007).

9 **A. Injunctive Relief**

10 Plaintiff seeks to permanently enjoin Defendant from infringing on its SIMPLY
11 NATURAL mark (Reg. No. 2,604,270) in the future. Injunctive relief is authorized under 15
12 U.S.C. § 1116(a) to prevent violations under § 1125.

13 Generally, “injunctive relief is the remedy of choice for trademark cases, since there is no
14 adequate remedy at law for the injury caused by defendant's continuing infringement.” *Century*
15 *21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1180 (9th Cir. 1988). In light of Defendant's
16 potentially ongoing violations of 15 U.S.C. § 1125, the Court believes that permanent injunctive
17 relief is appropriate with respect to the SIMPLY NATURAL mark. *See Verizon California Inc. v.*
18 *Online NIC*, C 08-2832 JF (RS), 2008 WL 5352022 (N.D. Cal. Dec. 19, 2008) (citation omitted).
19 Accordingly, the Court recommends that Defendant be enjoined from infringing on Plaintiff's
20 mark.

21 For the Court's contempt power to apply to this injunction, Defendant “must receive actual
22 notice of the order by personal service or otherwise.” Fed. R. Civ. P. 65(d). The Court
23 recommends that Plaintiff be instructed to provide proper service of this order, by personal service
24 to the extent possible, within thirty days, and that Plaintiff be ordered to file a copy of the proof of
25 service.

26 **B. Attorneys' Fees**

27 Plaintiff next asks the court to grant an award of attorneys' fees in the amount of \$8880.00
28 (Decl. of Barry G. Harrison, “Barry Decl.”, Dkt. No. 16, ¶4.)

15 U.S.C. § 1117(a) provides that the Court shall award “the costs of the action” where the defendant has violated 15 U.S.C. §§ 1125(a) or (d), and “may award reasonable attorney fees” in exceptional cases. 15 U.S.C. § 1117(a). Generally, “[a] trademark case is exceptional where the district court finds that the defendant acted maliciously, fraudulently, deliberately, or willfully.” *Wattec Co. v. Liu*, 403 F.3d 645, 656 (9th Cir. 2005). Here, Defendant’s infringement of Plaintiff’s SIMPLY NATURAL trademark appears to be willful, as Defendant had actual knowledge of Plaintiff’s mark before it began using its own trademarks. Specifically, Defendant had knowledge of Plaintiff’s mark when its intent-to-use application for SIMPLY NATURAL was refused registration due to Plaintiff’s registered trademark. After its application was denied, Defendant knowingly proceeded to infringe Plaintiff’s mark by continuing to sell its products in the stream of commerce under the SIMPLY NATURAL and R SIMPLY NATURAL designations. Defendant’s acts are made even more egregious by the fact that Defendant is using its marks for highly similar goods - premium grain-free dog treats, raising the likelihood of consumer confusion. Additionally, Defendant did not stop its actions even after receiving Plaintiff’s cease and desist letter. Accordingly, the Court finds that this is an exceptional case within the meaning of 15 U.S.C. § 1117(a).

The court may use its discretion to award the prevailing party full recovery of attorneys’ fees. 17 U.S.C. § 505. In calculating reasonable attorneys’ fees, the Ninth Circuit applies the Lodestar method. *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1065 (N.D. Cal. 2010). Under the Lodestar method, the court multiplies a reasonable hourly rate by the reasonable number of hours worked. *Id.* A party seeking attorneys’ fees bears the burden of demonstrating that the rates requested are “in line with the prevailing market rate of the relevant community.” *Carson v. Billings Police Dep’t*, 470 F.3d 889, 891 (9th Cir. 2006). Generally, “the relevant community is the forum in which the district court sits.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). Therefore, the court must analyze the reasonableness of an attorneys’ fees award by looking at (1) the reasonableness of the attorneys’ hourly rates and (2) the reasonableness of the hours worked. *See Craigslist*, 694 F. Supp. 2d at 1066.

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1 1. Reasonableness of Attorney's Hourly Rate

2 Plaintiff's counsel states that his hourly rate is \$400 per hour. (Barry Decl. ¶ 4.) Counsel
3 asserts that this rate is reasonable in light of his thirty years of experience practicing litigation,
4 including trademark litigation, in California. (*Id.*) Furthermore, counsel implies that his rate is
5 reasonable given his experience as former President of the International Trademark Association,
6 and that he has testified several times as an expert witness on trademark issues. (*Id.*) He also
7 believes his billing rate to be lower than that of lawyers with comparable experience in Northern
8 California. (*Id.*) The Court finds that counsel's hourly rate is reasonable for an attorney with his
9 experience and generally consistent with rates for comparable attorneys doing similar work in this
10 area. *See Craigslist, Inc.*, 694 F. Supp. 2d at 1067 (applying adjusted 2008-2009 *Laffey* matrix for
11 reasonable attorney rates to reflect San Francisco regional factors, court concluded that reasonable
12 hourly rate for an attorney with 20 or more years of experience is \$516 per hour.) Therefore,
13 counsel's hourly rate is reasonable under the circumstances.

14 2. Reasonableness of the Hours Worked

15 Next, the court must determine whether the amount of hours worked is reasonable.
16 Plaintiff's counsel states that he worked a total of 22.2 hours on this matter, which includes the
17 drafting of the complaint, as well as the application for default judgment. (Barry Decl. ¶ 4.)
18 These hours are reasonable. *See Yahoo!, Inc. v. Net Games, Inc.*, 329 F. Supp. 2d 1179, 1188-89
19 (N.D. Cal. 2004.) (In trademark infringement action that resulted in default judgment, 74.4 hours
20 for services performed by attorneys was reasonable for purposes of awarding attorney fees.).
21 Therefore, this Court RECOMMENDS that Plaintiff be awarded \$8880.00 in attorneys' fees.

22 **C. Costs**

23 Plaintiff seeks an award of reasonable costs in the amount of \$504.98, which includes the
24 \$400 filing fee, the \$65 process server fee, and mailing fees. (Barry Decl., Dkt. No. 16, ¶5.)
25 These costs appear reasonable. Therefore, the undersigned RECOMMENDS that the district court
26 award costs in the amount of \$504.98.

27 **D. CONCLUSION**

28 For the reasons set forth above, the undersigned recommends that Plaintiff's motion for

1 default judgment be GRANTED, and that the district court award Plaintiff attorneys' fees and
2 costs in the amount of \$9384.98.

3 This Court further recommends that Defendant shall comply with the following:

4 (1) Pursuant to the Court's authority under 15 U.S.C. § 1116(a), Defendant, their agents,
5 servants, employees, attorneys, and any and all persons in active concert or
6 participation with any of them, are hereby permanently enjoined and restrained from:

7 a. Using the SIMPLY NATURAL and R SIMPLY NATURAL marks, or any
8 mark confusingly similar, in connection with the unauthorized manufacturing,
9 marketing, promotion, advertising, sale, or distribution of pet treats and pet
10 food, in a manner likely to confuse consumers as to the association, affiliation,
11 endorsement, or sponsorship of Central Garden & Pet Company; and
12 b. Any acts of infringement of Plaintiff's SIMPLY NATURAL trademark.

13 (2) Pursuant to 15 U.S.C. § 1118, Defendant shall destroy all literature, signs, labels,
14 prints, packages, wrappers, containers, advertising materials, stationary, and any other
15 items in its possession or control for pet treats or pet food that contain the infringing
16 SIMPLY NATURAL and R SIMPLY NATURAL designations, or any term, symbol,
17 or logo confusingly similar to SIMPLY NATURAL, either alone or in combination
18 with other words or symbols and to destroy all computer back-up files and tapes,
19 plates, molds, matrices, masters, and other means in their possession or control of
20 making any of those infringing items.

21 (3) Defendant shall file with the Court and serve on Plaintiff, within thirty days after entry
22 of an injunction, a report in writing, under oath, setting forth, in detail, the manner in
23 which they have complied with the Court's injunction and orders. Judgment shall be
24 entered accordingly.

25 (4) Additionally, Plaintiff shall serve copies of this report and recommendation on
26 Defendant.

27 Any party may file objections to this report and recommendation with the District Judge
28 within 14 days of being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); N.D.

1 Civil L.R. 72-3. The parties are advised that failure to file objections within the specified time
2 may waive the right to appeal the District Court's order. *IBEW Local 595 Trust Funds v. ACS*
3 *Controls Corp.*, No. C-10-5568, 2011 WL 1496056, at *3 (N.D. Cal. Apr. 20, 2011).

4 IT IS SO RECOMMENDED.

5 Dated: July 2, 2015


6 KANDIS A. WESTMORE
7 United States Magistrate Judge